IN THE HIGH COURT OF JUDICATURE AT MADRAS

WEDNESDAY THE TWENTY SECOND DAY OF MARCH
TWO THOUSAND AND SIX

CORAM

THE HONOURABLE MR. JUSTICE A. KULASEKARAN

Second Appeal Nos. 269 and 270 of 2006

Panduranga Gramani ..Appellant in both the appeals (1st defendant)

Versus

1. Sundaram
2. Unnamalai Ammal
3. Srinivasan
4. Vellaiammal @ Avani Ammal .. Respondents in
5. Elumalai S.A. No. 269/2006 (2nd
6. Aryamala Plaintiff and defendants 2,3,5,6 and 7)

1. Sundara Gramani
2. Ranganathan
3. Radha
4. Muthulakshmi
5. Minor. Kandan
6. Minor. Arumugam
7. Ravakannu
8. Santhanam
9. Vedhagiri
10. Sekar
11. Nandanam
12. Mani
13. Murugan
14. Unnamalai .. Respondents in
15. Avaniammal S.A. No. 270/2006 (Defendants 4 to 13, 16 to 21, 23 and 24)
16. Amsa
17. Elumalai
18. Sowmya

S.A. No. 269 of 2006: Second appeal under Section 100 CPC against the decree and judgment dated 26.11.2004 made in A.S. No. 21 of 2001 on the file of Additional Subordinate Judge, Tindivanam reversing the decree and judgment dated 28.02.2001 made in O.S. No. 1067 of 1990 on the file of Principal District Munsif, Tindivanam.

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S.A. No. 270 of 2006: Second appeal under Section 100 CPC against the decree and judgment dated 26.11.2004 made in A.S. No. 22 of 2001 on the file of Additional Subordinate Judge, Tindivanam confirming the decree and judgment dated 28.02.2001 made in O.S. No. 55 of 1990 on the file of Principal District Munsif, Tindivanam.

For Appellant : Mr. R. Thirugnanam in both the second appeals

COMMON JUDGMENT

These second appeals are listed today for admission and I heard the learned counsel for the appellant.

2. The first defendant in O.S. No. 1067 of 1990 before the Principal District Munsif, Tindivanam is the appellant in Second Appeal No. 269 of 2006. The said suit was filed by the plaintiffs therein for declaration and permanent injunction.

3. The plaintiff in O.S. No. 55 of 1990 before the Principal District Munsif, Tindivanam is the appellant in Second Appeal No. 270 of 2006. The said suit was filed by him for declaration of 1/3rd share in the suit A Schedule Well marked as 'W' in the plan annexed with the plaint, for right of channel described in B Schedule property marked 'AB' and for permanent injunction.

4. The issues involved in both the appeals are common and hence, they are disposed of by this common judgment.

5. For the sake of convenience, the parties shall be referred to as they were arrayed before the trial court.

6.(a) The case of the Plaintiff in O.S. No. 55 of 1990 is that he is the son of Munusamy Gramani. The said Munusamy Gramani and Manicka Gramani are brothers and they were living as a joint family. Thanjammal was grandmother of Manicka Gramani and Munusamy Gramani. Thanjammal's foster son was Govinda Gramani. Govinda Gramani's son was Saminatha Gramani. The properties comprised in Survey No. 202/11, 202/12 besides some other properties were purchased in the name of Manicka Gramani, being the elder member of the joint family and the said properties were enjoyed in common by Munusamy Gramani and Manicka Gramani. In partition, the 1/3 share of the suit well was allotted to Manicka Gramani. Saminatha Gramani took the property comprised in Survey No.202/13. The Plaintiff's father Munusamy Gramani, Manicka Gramani and Saminadha Gramani

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all had 1/3rd equal share in the suit well and all of them enjoyed the same for several years. After the death of Munusamy Gramani, the plaintiff inherited the properties. The eldest among the family Manicka Gramani died. The said Manicka Gramani had four sons, among them three sons namely Thangavel, Ayyadurai and Samikannu died and the only son namely the first defendant Nandagopal succeeded to his father's estate. The said Thangavel had 2 daughters namely Kasiammal and Kamatchi and they also died. The defendants 10 to 14 are legal heirs of Kamatchi. The third defendant is the wife and fourth defendant is the son of Ayyadurai. The second defendant is the wife of deceased Samikannu. By this geneology, the defendants 1 to 14 are legal heirs of deceased Manicka Gramani and they are entitled to a share in the suit well. The Plaintiff has been using the suit well for irrigation purpose by installing an oil engine. On 20.12.1989, the defendants restrained the plaintiff from taking water from the suit well. The plaintiff was irrigating his lands through the suit well by an oil engine. To the north of the plaintiff's engine, the defendants installed their engine for irrigation purpose. The fourth defendant and others are attempting to destroy the channel which has been enjoyed by the plaintiff and other ancestors for several years, hence the suit.

(b) The defendants in O.S. No. 55 of 1990 have filed their written statement contending that Manicka Gramani and Munusamy Gramani were divided brothers and they have divided whatever properties they had long before 1900; that the allegation that the property comprised in Survey No.202/11 was allotted to Manicka Gramani and the property further south of it was allotted to the share of Munusamy Gramani is false as the said property exclusively belonged to Manicka Gramani, hence, Munusamy gramani cannot claim any interest in the same; that there was no well in the suit property at the time when Manicka Gramani and Munusamy Gramani divided their properties; that the plaintiff is not entitled to 1/3rd share in the well; that the plaintiff never used the said well for irrigation purpose; that the first defendant and fourth defendant installed oil engine in their respective wells and irrigating their lands and the plaintiff has been making false statement over the same; that the Plaintiff is not entitled to the remedies sought for and prayed for dismissal of the suit.

7. (a) The case of the Plaintiffs in O.S. No. 1067 of 1990 is that the suit property and other properties originally belonged to Manicka Gramani, the father of the first plaintiff. Manicka Gramani died 35 years ago, leaving plaintiff and also other heirs. By mutual arrangement, the family of four sons of Manicka gramani cultivated their respective portion of the properties. As per the said oral arrangement, the suit property is now in possession of the plaintiff. Manicka Gramani and Munusamy

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Gramani are brothers and they divided their properties before 1900. Defendant is the son of Munusamy Gramani. Each of them independently purchased properties and the suit property is one such property purchased by Manicka Gramani from Manjani Kounder and others under Sale deed dated 22.05.1901 and was in possession and enjoyment of the same. There is a well sunk by Manicka Gramani in the property situate North of the suit property which is used for irrigating the suit property. One Thanjammal was the grand mother of Manicka Gramani. Thanjammal's foster son was one Govinda Gramani. Thanjammal possessed considerable properties, which were bequeathed by her by executing a will in favour of Manicka Gramani, Munusamy Gramani and her foster son Govinda Gramani's son Saminathan. On 22.07.1926 the beneficiaries of the said Will divided their respective properties. Neither Munusamy Gramani, nor his son the defendant herein is not entitled to any right over the suit property. Now, the defendants are attempting to trespass into the suit property and evict the plaintiffs from the same, hence the suit.

(b) The defendants have filed their written statement stating that this suit is filed as a counter to the suit filed by this defendant in O.S. No. 55 of 1990. The properties comprised in Survey No.202/11 and 202/12 were common properties belonged to the brothers of Munusamy Gramani and Manicka Gramani. Both the properties were purchased in the year 27.08.1894 and 01.08.1901 and at the time of purchase, the joint family consisting of Manicka Gramani, Munusamy Gramani and their sisters son Saminatha Gramani were in common possession and enjoyment. Manicka Gramani was the head of the family and therefore the property was purchased in his name. The alleged will was never acted upon. The Plaintiff is not entitled to any relief sought for in this suit. Manicka Gramani and his legal heirs are necessary parties to the suit and they were not arrayed as parties as such the suit is bad for non-joinder of necessary parties.

8. The trial court taken up both the suits for joint trial and the parties have let in common evidence. The plaintiff in O.S. No. 55 of 1990 was referred to as plaintiff who has marked Exs. A1 to A29 and examined himself as PW1, Ramasamy and Elumalai as PWs 2 and 3 respectively. The Plaintiffs in O.S. No. 1067 of 1990 was referred to as defendants who have marked Exs. B1 to B54 and Nandagopal examined himself as DW1, one Gnanamoorthy and Gajendran were examined as DWs 2 and 3 respectively.

9. The trial court found that though both sides have examined witnesses, none of the witnesses were able to say when the partition took place between Manicka Gramani, Munusamy Gramani and Saminatha Gramani; that both the sides have not filed any written document to prove the partition; that if partition had taken place prior to

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1901, then Munusamy Gramani could not had any share over the properties purchased during the year 1901 and this crucial question was not answered by both the parties sufficiently and convincingly and came to a conclusion that both the parties have failed to prove when partition between Manicka Gramani, Munusamy Gramani and Saminatha Gramani took place that is after the year 1901 or prior to 1901 and decided that issue against both the parties. That there is no evidence let in by the appellant to say when the suit well was dug or whether it existed on the date of purchase of the properties comprised in Survey No.202/11 and 202/12 and held that the suit well could not have been common to Manicka Gramani, Munusamy Gramani or Saminatha Gramani and ultimately dismissed both the suits.

10. Aggrieved by the decree and judgment made in O.S. No. 55 of 1990, the appellant herein has filed A.S. No. 22 of 2001 before the Additional Subordinate Judge, Tindivanam and as against the decree and judgment made in O.S. No. 1067 of 1990, A.S. No. 21 of 2001 was filed by the first respondent in S.A. No. 269 of 2006.

11. (a) The first appellate Court on careful consideration of oral and documentary evidence decided the issues involved in A.S. No. 22 of 2001 and pointed out that though the plaintiff in OS No. 55 of 1990 has stated that the properties in Survey No.202/11, 202/12 and other properties were enjoyed in common and thereafter partition took place between the parties, in Ex.B4, partition deed dated 22.07.1926, the said details were not mentioned. Even in Ex.A21, Will executed by Thanjammal, there is no mention about the alleged common well in Survey No.202/11, besides that the defendants had not raised any dispute over irrigating the lands from the common well, hence, it held that the suit O.S. No. 55 of 1990 has been filed to deprive the rights of the defendants and accordingly, dismissed A.S. No. 22 of 2001.

(b) In so far as the issues involved in A.S. No. 22 of 2001 is concerned, the first appellate Court pointed out, relying on Exs. B43 to B54, kist receipts that the plaintiff in O.S. No. 1067 of 1990 is in possession of the property, but the trial court failed to consider the same. It is also pointed out that the suit property had been in possession of the plaintiffs in OS No. 1067 of 1990 from 22.01.1959 to 03.03.1993, the date of issuance of Ex.B5, and B42, kist receipt and held that the plaintiffs are having a valid right over the property and are entitled to the relief sought for in the suit and ultimately, it set aside the decree and judgment of the trial court made in O.S. No. 1067 of 1990 and allowed A.S. No. 21 of 2001.

12. The learned counsel appearing for the appellant submits that the courts below failed to take into consideration that the suit well was not partitioned, hence, Manicka Gramani, Munusamy Gramani and Saminatha

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Gramani are entitled to one third share in the suit well and right of channel; that the patta was issued under Ex.A3 in respect of the properties allotted to the share of Munusamy Gramani and he has paid kist under Ex.A4 to A20; that the lower appellate Court failed to note that the appellant's suit O.S. No. 55 of 1990 was filed on 23.01.1990 i.e., prior to O.S. No. 1067 of 1990, which was filed only on 07.11.1990 as a counter blast to the suit filed by the appellant; that the courts below have not properly appreciated the partition deed Ex.B4 dated 22.07.1926; that the courts below failed to note that the appellant herein has filed O.S.N o. 55 of 1990 since the respondents have objected the appellant from taking water from the suit well and prayed for setting aside the decree and judgment of the first appellate Court.

13. The Plaintiff/appellant in both the second appeals has filed O.S. No. 55 of 1990 for declaration to declare his 1/3 share in the common well referred as 'W' in the plaint sketch, located in 0.03 acres comprised in Survey No.202/11 and for right of drawing water in the channel referred as 'AB', located in 0.01 ½ acres comprised in Survey No.202/11. The Plaintiff/appellant is the first defendant in O.S. No. 1067 of 1990 which was filed by the defendants/first respondent herein for declaration of their title in the lands to an extent of 92 cents comprised in Survey No.202/11 and for permanent injunction restraining the plaintiff/appellant herein from interfering with their peaceful possession and enjoyment of the properties.

14. The case of the plaintiff/appellant herein is that originally, in the joint family, his father Munusamy Gramani and his brothers Manicka Gramani and Saminatha Gramani were living together. The properties comprised in Survey No.202/11 and 202/12 and other properties were purchased by them, however, in the name of Manicka Gramani as he was the eldest among them, later a partition took place in which, except the well, the lands in Survey No.202/11 was allotted to his father Munusamy Gramani and the land in Survey No.202/12 was allotted to Manicka Gramani. In the well, all the three brothers were allotted undivided 1/3 share and they were in enjoyment of their respective lands and also undivided share in the well.

15. In Ex.B4, partition deed dated 22.07.1926, the land in S.No.202/12 to an extent of 92 cents and Well were not included. In Ex.A21 dated 05.02.1909, Will executed by Thanjammal in favour of Manicka Gramani, Munusamy Gramani and Saminatha Gramani, the common well was not found mentioned. In Ex.A22, mortgage deed dated 29.05.1951, the common well is mentioned and the right to irrigate the channel from the common well was given to Avani Gramani. In the said Ex.A22, it is further mentioned that in Survey No.202/11 to an extent of 96

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cents, the well is located in 04 cents. The Defendants/first respondent herein filed the suit O.S. No. 1067 of 1990 for declaration only in respect of lands to an extent of 92 cents comprised in Survey No.202/12. In the said suit, they have not sought for any remedy pertaining to the common well. The first appellate Court, considering the relief sought for by both the parties in the above said suits came to a conclusion that the plaintiff/appellant herein has filed O.S. No.55 of 1990 only to cause hardship to the defendants/first respondent herein and confirmed the decree and judgment of the trial court passed in O.S. No. 55 of 1990.

16. The case of the Defendants/first respondent in both the second appeals is that the property comprised in Survey No.202/11 to an extent of 92 cents was purchased by his father Manicka Gramani in his name and he was in enjoyment of the same till his death and thereafter, the said property devolved on them. It is denied by the defendants that the said property in Survey No.202/12 was purchased out of joint family funds in the name of their father, who was eldest in the family. In support of the above contentions, the defendants have marked Ex.B1. Ex.B4, partition deed dated 22.07.1926 wherein the land in Survey No.202/12 was not included.

17. The first appellate Court has rightly entertained a doubt that if the said land is purchased out of the joint family property, it would have been allotted to one of them or mentioned in Ex.B4, partition deed. Since nothing was mentioned in Ex.B4, the averment that it was purchased in the name of Manicka Gramani as he was the eldest in the joint family is unacceptable. It is also pointed out that the plaintiff/appellant herein has admitted in his written statement in O.S. No. 1067 of 1990 that the suit property was purchased in the name of Manicka Gramani, but he has not explained in his evidence that the same was purchased for the benefit of the joint family, hence, the same was treated all along as personal property of Manicka Gramani. It is to be remembered that in O.S. No. 1067 of 1990 was filed by Nandagopal and Sundaram. Pending suit, Nandagopal died but his legal representatives were not impleaded, however, Sundaram alone filed A.S. No. 21 of 2001 against the decree and judgment of the trial Court in O.S. No. 1067 of 1990. The said Sundaram is none other than the nephew of deceased Nandagopal. The first appellate Court further pointed out that the documents Exs. B43 to B53, kist receipts for the period 1974 to 2000 stand in the name of Sundara Gramani, the first respondent in both the second appeals. It is to be remembered that the suit O.S. No. 1067 of 1990 was filed on 07.11.1990, hence, Exs. B51 to B53 are after the suit, however, Exs. B43 to B50 are prior to the said suit, hence, the first appellate Court came to a conclusion that the land in Survey No.202/12 to an extent of 92 cents was in possession of the first respondent in both the second

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appeals and therefore he is entitled to the relief sought for in O.S. No. 1067 of 1990.

18. It is argued by the learned counsel for the appellant that kist receipt alone cannot be taken as a substantial piece of evidence to declare title. Of course, the said document cannot be ignored, however, considering the fact that the property in Survey No.202/12 was purchased under Ex.B1 dated 22.05.1901 in the name of Manicka Gramani and the same was not included in Ex.B4, partition deed dated 22.07.1926 and also Ex.A21, Will dated 05.02.1909, the relief sought for by the first respondent in both the second appeals was rightly granted by the first appellate Court by setting aside the decree and judgment of the trial court, as the trial court failed to consider the said documents in the proper perspective.

19. Section 90 of the Evidence Act, 1872 says that where any document, purporting or proved to be thirty years old, is produced from any custody which the Court in the particular case considers proper, the Court may presume that the signature and every other part of such document, which purports to be in the handwriting of any particular person, is in that person's handwriting, and, in the case of a document executed or attested, that it was duly executed and attested by the persons by whom it purports to be executed and attested.

20. In this case, the property mentioned in O.S. No. 1067 of 1990 to an extent of 92 cents comprised in Survey No.202/12 was purchased in the name of the first respondent's grandfather under Ex.B1 dated 22.05.1901, which is 89 years prior to the filing of the suit. In Ex.B4, partition deed dated 22.07.1926 the said land was not included. Ex.B4 is about 64 years prior to the filing of the suit. Section 90 of the Evidence Act is founded on necessity and convenience because it is extremely difficult and sometimes not possible to lead evidence to prove handwriting, signature or execution of old documents after lapse of thirty years. In order to obviate such difficulties or improbabilities to prove execution of an old document, Section 90 has been incorporated in the Evidence Act, 1872 which does away with the strict rule of proof of private documents. Presumption of genuineness may be raised if the documents in question is produced from proper custody. It is, however, the discretion of the court to accept the presumption flowing from Section 90. There is, however, no manner of doubt that judicial discretion under Section 90 should not be exercised arbitrarily and not being informed by reasons. The Honourable Supreme Court in the decision (Sri Lakhi Baruah and others v. Sri Padma Kanta Kalita and others) AIR 1996 Supreme Court 1253 held in para Nos. 15 and 16 thus:-

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15. Section 90 of the Evidence Act, 1872 is founded on necessity and convenience because it is extremely difficult and sometimes not possible to lead evidence to prove handwriting, signature or execution of old documents after lapse of thirty years. In order to obviate such difficulties or improbabilities to prove execution of an old document, Section 90 has been incorporated in the Evidence Act, 1872 which does away with the strict rule of proof of private documents. Presumption of genuineness may be raised if the documents in question is produced from proper custody. It is, however, the discretion of the court to accept the presumption flowing from Section 90. There is, however, no manner of doubt that judicial discretion under Section 90 should not be exercised arbitrarily and not being informed by reasons.

16. So far as applicability of presumption arising from Section 90 of the Evidence Act, 1872 in respect of copy of the old document is concerned, the earliest decision of the Indian Court was made in 1880 in Khetter Chunder Mookerjee v. Khetter Paul Sreeterutno. Later on, in the decisions of various High Courts the presumption under Section 90 was also made applicable to the certified copy. The Privy Council, upon review of the authorities, however, did not accept the decision rendered in Khetter and other decisions of the High Court, where the presumption was attached also to copies, as correct. It was indicated that in view of the clear language of Section 90 the production of the particular document would be necessary for applying the statutory presumption under Section 90. If the document produced was a copy admitted under Section 65 as secondary evidence and it was produced from proper custody and was over thirty years old, then the signature authenticating the copy might be presumed to be genuine; but production of the copy was not sufficient to justify the presumption

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> of due execution of the original under Section 90. In this connection, reference may be made to the decisions in Seetnayya v. Subramanya, 56 Ind APP 146: AIR 1929 PC 115 and Basant v. Brijraj AIR 1933 PC 132. In view of these Privy Council decisions, disproving the applicability of presumption under Section 90 to the copy or the certified copy of an old document, in the subsequent decisions of the High Courts, it has been consistently held by different High Courts that production of a copy or a certified copy does not raise the presumption under Section 90.

21. When the ratio laid down by the Honourable Supreme Court is applied in this case by extending the benefits of Section 90 and also the fact that possession for long period is proved by documents Exs. B43 to B50, the declaration sought for by first respondent in both the second appeals could be granted without any hesitation. The first appellate Court has rightly granted the said relief sought for by the first respondent in both the second appeals and hence the same is confirmed.

22. The appellant herein has not proved his title in the Well and the channel, both are comprised in Survey No.202/11, hence, the same was rightly rejected by the courts below.

23. In view of the above said discussion, the decree and judgment passed by the first appellate Court in A.S. No. 21 of 2001 setting aside the judgment and decree in O.S. No. 1067 of 1990 is confirmed and the judgment and decree in A.S. No. 22 of 2001 confirming the judgment and decree in O.S. No. 55 of 1990 is confirmed. Both the second appeals are dismissed as devoid of merits at the time of admission itself. No costs.

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To

1. The Additional Subordinate Judge
   Sub-Court
   Tindivanam

2. The Principal District Munsif
   District Munsif Court
   Tindivanam

3. The Section Officer
   Vernacular Records Section
   High Court of Madras
   Madras - 600 104

+ one cc to Mr. R. Thirugnanam, Advocate sr no. 14315

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